LIBRARY
SUPREME COURT, U S

FILED
MAR 21 1975

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-990

HAROLD MUNGER, GERALD HARTLEY, and SAINT JULIAN HARRISON,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Two World Trade Center
New York, New York 10047

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
A. State Proceedings	2
B. Federal Proceedings	3
Reasons for Denying the Petition for Certiorari	5
The Court of Appeals properly denied petitioners' application for a certificate of probable cause and no issue is presented for certiorari review	5
Conclusion	9

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-990

HAROLD MUNGER, GERALD HARTLEY, and SAINT JULIAN HARRISON,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent opposes the petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, dated January 9, 1975, which denied petitioners' application for a certificate of probable cause. Petitioners sought to appeal from an order of the United States District Court for the Southern District of New York, dated December 18, 1973, which denied their application for a writ of habeas corpus.

Opinions Below

The Second Circuit denied petitioners' application for a certificate of probable cause without opinion. The order is unreported and is reproduced as Appendix "A" to the

petition. The opinion of the District Court denying the application for a writ of habeas corpus is unreported and is reproduced as Appendix "B" to the petition.

Jurisdiction

The order of the Court of Appeals was entered on January 9, 1975. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Question Presented

1. Have petitioners presented any factor which would motivate the exercise of this Court's certiorari jurisdiction?

Statement of the Case

A. State Proceedings

Petitioners were convicted of the crimes of felonious possession of narcotics and bribery on March 5, 1968, in the Supreme Court, Bronx County (MARKS, J.), after a trial by jury. The judgments of conviction were affirmed by the Appellate Division, First Department. *People* v. *Munger*, 30 A D 2d 776 (1968). The New York Court of Appeals modified the judgments, ordering a remand to the trial court for a suppression hearing to determine if certain wiretaps were conducted illegally and if so, whether the illegal evidence tainted the convictions. 24 N Y 2d 445, *mot. to amend the remittur den.* 24 N Y 1026 (1969).

On December 17, 1969, after a suppression hearing, the trial court found that the wiretap evidence was illegally obtained and had tainted both convictions. Justice Marks ordered a new trial. On November 23, 1971, the Appellate Division modified the order by reversing the trial court insofar as it had ordered a new trial on the bribery charges.

The Court held that the record clearly showed that the bribery offer was an independent and voluntary act, untainted by the illegally seized evidence. Accordingly, the bribery convictions were reinstated. 37 A D 2d 950 (1st Dept. 1971). Cross appeals to the New York Court of Appeals were dismissed in July, 1973. Petitioners stand convicted of bribery, and each is serving a sentence of five to ten years.* The narcotics charges were dismissed on April 17, 1974.

B. Federal Proceedings

Petitioners then brought their federal habeas corpus petition in the District Court.** They alleged that:

1. The prosecution failed to prove beyond a reasonable doubt that the illegal wiretaps were not used in the bribery prosecution;

2. Certain tapes were destroyed;

3. Certain allegedly exculpatory tapes were concealed from the defense at trial;

4. No hearing was held on the question of taint regarding the bribery conviction;

5. The jury's hearing illegal evidence with respect to the narcotics charge prejudiced its decision on the bribery charge;

6. The Appellate Division did not have jurisdiction to reinstate the bribery conviction.

---

* On February 19, 1975 petitioner Harrison pleaded guilty to manslaughter in the second degree in the Supreme Court, New York County. He is scheduled to be sentenced on March 20, 1975.

** The proper respondent in this case is not the People of the State of New York but John W. Ackerson, warden of the Bronx House of Detention, Bronx, New York, where petitioners are confined.

The District Court had before it the minutes of the trial and the subsequent suppression hearing (including transcripts and summaries of the tapes) and the briefs of both parties in the New York Court of Appeals. On December 18, 1973, in a thorough opinion, the District Court denied the application and ordered that no certificate of probable cause issue. As to petitioners' first claim, the Court found that the Appellate Division, in reinstating the bribery conviction, had applied the correct burden of proof in evaluating the taint. This is amply clear from the Appellate Division's opinion. *People* v. *Munger, supra,* 37 A D 2d at 950. The suggestion that the bribery convictions were inherently tainted by the prior illegal wiretaps was rejected since illegal conduct by the government which presents a defendant with an opportunity to commit bribery does not affect the validity of the bribery conviction.

As to the contention that a certain allegedly exculpatory tape was concealed from the defense at trial (claim 2), the Court found that the tape was not exonerating and thus that there was no prejudice to the defense. The erasure of certain tapes (claim 3) was held not to be prejudicial to the defense since summaries of the tapes were made available. Petitioners did not contest the accuracy or completeness of the summaries, and the summaries clearly showed that bribery was in no way mentioned in these tapes.

Petitioners' claims 4 and 5 were not considered by the Court since the Court held that they had not been exhausted in the state courts. Petitioners claimed that no hearing was ordered on the question of taint with respect to the bribery conviction because the Appellate Division reinstated the judgment without exploring the issue. This claim is apparently related to the next claim, which alleges that the jury, having heard the illegal evidence relating to the narcotics charge, must have been prejudiced on the bribery charge. Finally, the Court refused to consider the question of whether or not the Appellate Division had the

jurisdiction to reinstate the bribery conviction, since this is a question of state law only (claim 6).

Approximately eleven months later, petitioners applied to the Court of Appeals for a certificate of probable cause to appeal. In their application they raised only two contentions: 1) that the lower court had erred in finding claims 4 and 5 unexhausted, and 2) that the lower court erred in refusing to consider their claim regarding the jurisdiction of the Appellate Division. The application was denied without opinion on January 9, 1975. Petitioners now seek to review the Court of Appeals' order denying them a certificate of probable cause to appeal. They raise the same two contentions in this Court as were resented to the Court of Appeals.

Reasons for Denying the Petition for Certiorari

The Court of Appeals properly denied petitioners' application for a certificate of probable cause and no issue is presented for certiorari review.

The federal habeas corpus statute requires that a petitioner detained pursuant to state process obtain a certificate of probable cause before he can take an appeal in a habeas corpus proceeding. 28 U.S.C. § 2253. The federal courts have stated that the Congressional intent in enacting this provision was to impose strict limitations upon appeals in habeas corpus cases arising from state detention (*United States ex rel. Carey* v. *Keeper of Montgomery County Prison*, 202 F. 2d 267 [3d Cir. 1953]) and to eliminate frivolous appeals. *Ex Parte Farrell*, 189 F. 2d 540, 543 (1st Cir.), *cert. den. Farrell* v. *O'Brien*, 342 U.S. 839 (1951); *United States ex rel. Siegal* v. *Follette*, 290 F. Supp. 636, 637 (S.D.N.Y. 1968).*

---

* Petitioners Munger and Hartley were the actual applicants for a certificate in the latter case.

Accordingly, the test for the issuance of a certificate is that the question presented be "substantial" (*Thomas* v. *Duffy*, 191 F. 2d 360, 362 [1951]; *Ex Parte Farrell, supra* at 543; *United States ex rel. Siegal* v. *Follette, supra* at 637) or "adequate to deserve encouragement to proceed further" (*United States ex rel. Jones* v. *Richmond*, 245 F. 2d 234 [2d Cir.], *cert. den.* 355 U.S. 846 [1957]) and that it not be "plainly frivolous" (*Poe* v. *Gladden*, 287 F. 2d 249, 251 [9th Cir. 1961]) or "devoid of merit" (*Burgess* v. *Warden, Maryland House of Correction*, 284 F. 2d 486, 488 [4th Cir. 1960], *cert. den.* 365 U.S. 837 [1961]). Moreover, it is well established that a district court's prior denial of an application for a certificate should be given "weighty consideration" by a Court of Appeals judge. E.g. *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967).

The issue of the New York Appellate Division's jurisdiction to reinstate petitioners' bribery convictions is purely a question of state law, as the District Court held.* It involves the allocation of jurisdiction by the State among its courts and does not constitute a claim that petitioners are "in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2254(a). It is firmly established that questions of state law cannot be litigated in a federal habeas corpus proceeding. See, e.g., *Buchalter* v. *New York*, 319 U.S. 427 (1943); *United States ex rel. Sadowy* v. *Fay*, 284 F. 2d 246, 247 (2d Cir. 1960); *United States ex rel. Birch* v. *Fay*, 190 F. Supp. 105 (S.D.N.Y. 1961). Since an issue of state law obviously does not present a substantial question for review, the denial of a certificate of probable cause to appeal that issue was clearly correct. E.g. *United States ex rel. La Marca* v. *Denno*, 258 F. 2d 515 (2d Cir. 1958); *United States ex rel. Jones* v. *Richmond, supra; People of the State of New*

---

* This is amply demonstrated by the petition, which relies solely on state statutes and cases in support of the claim. Petition at 13-18.

York ex rel. Epps v. *Nenna,* 214 F. Supp. 102, 105 (S.D.N. Y. 1963).

Petitioners also claim that the lower courts erred in finding two of their claims unexhausted, to wit, that they were denied a hearing on the question of taint regarding the bribery conviction and that the jury's hearing illegal evidence with respect to the narcotics charge prejudiced its decision in the bribery charge. Petitioners concededly had a suppression hearing on the issue of taint. They apparently now seek a hearing on whether or not the jury was prejudiced on the bribery charge because it heard the illegal evidence on the narcotics charge, even if the bribery conviction was not based on the illegal wiretaps.

Petitioners allege that these claims were considered by the New York Court of Appeals on their direct appeal. However, petitioners claimed only that "the denial of an evidentiary hearing on the possible use of illegal wiretaps" constituted error. *People* v. *Munger, supra,* 24 N Y 2d at 448. The Court of Appeals remanded for a hearing on this issue and a hearing was held. Petitioners, therefore, can only be asserting a claimed right to a further hearing. This claim has not been presented to the state courts.

The exhaustion requirement, 28 U.S.C. § 2254, mandates that the claim raised in the federal court be fairly presented to the state courts first. E.g. *Picard* v. *Connor,* 404 U.S. 270, 275 (1971). The federal claim must not only be raised in the state courts, but must have been based on the identical, specific grounds asserted in the federal court. *Id.* at 276-77; *United States ex rel. Gibbs* v. *Zelker,* 496 F. 2d 991 (2d Cir. 1974). Petitioners clearly have not met this requirement. Neither the hearing claim or the claim of prejudice by the jury could have been presented or decided on petitioners' direct appeal since these two claims are based on the subsequent reinstatement of the bribery conviction by the Appellate Division (Petition at 11-12).

Apparently realizing the futility of their argument that these claims were exhausted on their direct appeal, petitioners now allege that they raised these issues on appeal from the Appellate Division order reinstating the bribery convictions (Petition at 10). This contention is conspicuously absent from their Court of Appeals application for a certificate. In any event, petitioners admit that their appeal was dismissed by the Court of Appeals on procedural grounds (Petition at 7). Consequently, the New York courts have never been called upon to consider the claims. Petitioners have an available state remedy under N.Y. Crim. Proc. Law § 440.10.

A claim which has not been exhausted in the state courts clearly does not present a substantial question for appeal. E.g. *United States ex rel. Rogers* v. *Stanley*, 294 F. 2d 772 (2d Cir. 1961); *United States ex rel. Siegal* v. *Follette*, *supra* at 637; *Rines* v. *Commonwealth of Pennsylvania*, 285 F. Supp. 391, 393 (E.D. Pa. 1968); *United States ex rel. Cox* v. *Rundle*, 282 F. Supp. 115 (E.D. Pa. 1968). Accordingly, there was no error in the Court of Appeals' denial of a certificate of probable cause.

Moreover, petitioners' only argument to this Court is that the courts below committed error. This contention is insufficient to invoke this Court's certiorari jurisdiction. E.g. *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923). Since petitioners have failed to present a substantial federal question or any other factor which would motivate the exercise of this Court's certiorari jurisdiction (Supreme Court Rules, Rule 19), their petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, March 20, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
Of Counsel